DOCUMENT RESUME

ED 359 752 FL 020 817

AUTHOR Bulow-Moller, Anne Marie
TITLE The Notion of Coercion in Courtroom Questioning.
PUB DATE Apr 92
NOTE 11p.; In: Nordic Research on Text and Discourse. NORDTEXT Symposium (Espoo, Finland, May 10-13, 1990); see FL 020 811.
PUB TYPE Speeches/Conference Papers (150) -- Reports - Research/Technical (143)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Court Judges; *Court Litigation; Foreign Countries; Inquiry; Juries; Lawyers; *Linguistic Theory; *Pragmatics; *Questioning Techniques; *Syntax
IDENTIFIERS Defendants; *Open Ended Questions; Witnesses; *Yes No Questions

ABSTRACT

To account for coercive force in questions posed by counsel to defendants and witnesses, several levels of speech must be addressed. Forensic linguistics literature discusses the scale of coerciveness as reflected in the syntactic form of the questions. It is argued that this type of analysis fails to account for the inferences made by hearers (i.e., judge and jury) and that syntactically coercive questions can be highly cooperative and vice versa. An analysis of the televised mock trial of Lee Harvey Oswald showed that the most coercive forces were found not so much at the syntactic level as at the pragmatic, situation-bound level, with control strategies isolated. On the surface, courtroom evidence consists of facts but in practice, facts are produced under syntactic and pragmatic coercion because they are tailored to the needs of the real addressee, the judge and jury. (JP)

The notion of coercion in courtroom questioning

ANNE MARIE BÜLOW-MØLLER

Abstract

Researchers in the field of 'forensic linguistics' often operate with a simple scale of coerciveness in questions: the syntactic form is correlated with speaker's control over hearer's options. This paper argues that this sort of analysis fails to account for the inferences that can be counted on in hearers (i.e. judge and jury): syntactically coercive questions can be highly cooperative and vice-versa. In the present corpus, the most coercive forces were found not so much at the syntactic level as at the pragmatic, situation-bound level, with control strategies isolated e.g. in attorneys' use of tact maxims and the use/mention distinction.

Linguists who study interaction in court are working with a discourse formed by tradition and respect. They therefore face a structure that is a priori right and proper and natural, and an ideology that is virtually invisible. Among the steadily growing number of analyses of language in court, a majority deal specifically with the way counsel question defendant and witnesses (see e.g. Adelswärd et al., 1987; Atkinson and Drew, 1979; Danet and her associates, 1976 onwards; Harris, 1984a,b; Walker, 1987).

To discuss the amount of *control* that counsel exert is also to query the idea that the purpose of evidence is just to get witnesses to tell their story. Counsel are obliged to extract information in a particular shape because of the peculiar communicative situation in court: they are not seeking information for themselves, but on behalf of judge and jury. This means that question sequences are planned so as make a point and to highlight its significance for the 'real' hearers, and it is this extra partner in the communicative process I want to concentrate on. I shall argue that it makes no sense to talk about 'coerciveness' and 'control' without the rest of the situation: communication has not taken place until the intended addressees have drawn their inferences from a given sequence, and fitted it into their image of the story that is being pieced together before them.

In the following, I shall use 'inference' in a loose sense, covering both logical abduction and conversational implicature.

1. The notion of coercion in questioning

There is a fair amount of agreement in the literature of forensic linguistics about the scale of coerciveness as reflected in the syntactic form of the question. The

descriptions distinguish steps on the scale in more or less detail, but the place on the scale does not vary greatly:

- least coercive are imperatives and other requests to tell a story, including 'requestions' such as *Can you tell us his name*, which are technically yes/no questions; - then follow wh-questions ('broad', as after *how* or *why*, 'narrow' after *who*, *where*, etc),
- yes/no questions, including closed alternatives such as *Miss or Mrs?*, and finally
- declarative statements with or without tag or rising intonation.

There is an obvious danger in pulling questions of a certain syntactic form out of their context and counting them, as do for instance Danet and Bogoch (1980) as one parameter in an attempt to measure 'combativeness'. Without the sequence, as e.g. Dunstan (1980) argues, with reference to the Danet/Bogoch study, there is no way of knowing if a request for information is heard as just that, or as a reinstated request, which is much more challenging, or as simple confirmation of something already established.

While agreeing wholeheartedly with the latter, I would like to pose an extra condition that seems very obvious but is often not specified: The degree of coerciveness cannot be gauged from the syntactic form without knowing if the responder is counsel's own witness or a hostile witness on cross-examination; the same form does not denote the same control, as will be shown presently.

It should be added at once that this difference shows up much more clearly within the adversary court system found e.g. in the United States than in the data obtained from depositions and from Swedish courts, where there is not necessarily the same single-minded emphasis on nailing the responder. The point about the context, however, holds good in all cases.

To illustrate the difference that the context imposes on interpretation I shall use examples from examinations-in-chief (in the following X) and cross-examinations (XX), all extracted from the mock 'trial' of Lee Harvey Oswald, which was widely televised in 1986, and which is therefore available for double-checks. The trial used witnesses from the original Senate hearings and it was unscripted; for this particular purpose, there is no reason to doubt that the material shows the same strategies as an ordinary trial in front of a jury. I have discussed other features of language analysis of this case in other papers, notably the way the two attorneys compete in establishing credibility and their use of strategic question sequences (Bülow-Møller, forthcoming).

2. Open questions

Imperatives and other open invitations are supposed to be restricted to counsel's own witness; they are primarily used when a well-rehearsed witness can be relied upon to 'tell the story in his own words', which aids counsel in presenting to the jury the testimony as spontaneous and unfettered.

The counsel for the Defence, Mr Spence, uses the imperative form extensively to signal that his witnesses have information that has been overlooked, in the classic 'Tell the Court, if you would, how you discovered that'-form. He also frames his invitations so as to include himself and signal co-operation: he uses the inclusive *Let's* form when he extracts evidence:

(1) X: - *Let's* now describe to the ladies and gentlemen of the jury what you were preparing to do.
W: - Prepare the body, remove the brain [...etc]

The same, supposedly open, form is used by Spence when the immediate addressee is the pathologist brought in by the Prosecution. Here is the opening:

(2) XX: - Now, there are some serious problems with this autopsy, aren't there, Doctor?
W: - There are some problems with the autopsy, yes
XX: So *let's* be honest with these ladies and gentlemen of the jury, and *let's* tèll them, let's just TELL them what the problem was.
W: [small gesture]
XX: - Did you ever..sée..the bráin?

Despite the form, this is *not* an invitation; it is a hoop to jump through. The difference resides in the handling of sincerity conditions: Spence does not for a moment believe that a hostile witness will damage his previous testimony by voluntarily setting out the problems, but by pointedly creating an occasion for the witness to furnish the jury with the whole truth, he also creates a ***marked absence***.

The picture is the same in the case of wh-questions. With the examining counsel's own witness, they elicit information in a relatively free, narrative form; they function explicitly as invitations.

Other studies, however, have demonstrated that wh-questions can also carry an accusation, if the circumstances are right. Harris (1984b), for example, lists examples of defendants who cannot pay, and who are met with questions such as 'How much did the carpet cost?' or 'How many jobs have you applied for in the last two weeks?'. There is a strong expectation that when the defendant mentions a figure, it will be

self-incriminating or at least show him to be irresponsible, and so the question functions as an accusation (op.cit.:20).

In the present material, there is a particular structure of hostile wh-questions, aimed directly at the jury. In the following example Mr Spence cross-examines a witness who watched the presidential motorcade from the floor below the window from which Oswald is alleged to have fired. He claims to have heard the shots overhead and the sound of the cartridge cases as they dropped to the floor. Spence tries to get him to say that any metal object would have sounded just the same, but the witness maintains that he is sure:

(3) XX: - I mean, had you ever heard - you never had heard metal cases from a, from a gun drop on your head before, had you?
W: - I told you what it sounded like to me.
XX: - Yeah. OK. *When* was the last time before the assassination that you'd ever heard a rifle eject a shell?
W: - I can't say the exact time.
XX: - Never heard one, had you.
W: - Yes sir, I've heard some.
XX: - All right.

Spence desists as it is obvious that the witness is unlikely to have had experience that allowed him to *recognize* the sound of shells falling on the floor over his head.

In this case, as with the open 'invitation', the gap is left open for the jury to notice. The freedom implied in the form is used ironically.

Three of the main features that constitute ironic usage are *pretended* advice, acceptance, praise and other positive moves (Muecke, 1978), *echoic* mention of something said or purportedly felt by the victim (Sperber and Wilson, 1986), and the *use/mention* distinction (Sperber and Wilson, 1981). There is a natural overlap between the three angles, *pace* Sperber (1984), for whom there is a sharp distinction; in this case, however, all three features can be demonstrated in the irony-carrying exchanges: Spence 'echoes' the witness's certainty, thereby pretending to 'accept' his position; this allows him to adopt the presupposition that an exact time can also be asked for. And he 'quotes' the attitude in the evidence - albeit in terms of mention-not-use, for one can hear the intonational quotation marks in his question, corresponding to a gloss such as 'OK, if, as you say, you have "heard a rifle eject a shell before", when was this?'

The conclusion is that the open question form, which ought to offer an invitation to the witness to explain himself, can be used on cross to let the witness hang himself. When counsel persists in marking the witness's terms as 'mentioned, not used' when he himself repeats them, he creates a distance of frank disbelief; but the coercion here is not in the syntactic form. What is threatening about the use-mention strategy is that its effect resides in the inferencing work done by the jury: any unanswered challenge

is a meta-message to them, for when the witness fails to provide the invited information, it is meant to trigger the implicature that he cannot substantiate his claim. It is even arguable that the attorney chooses a question form that forces the jury to do their own inferencing as more effective, on the principle of the reception-aesthetic 'blanks': judge and jury are much more likely to believe in a judgement they have formed themselves compared with one they have had suggested to them by an interested party.

3. Closed questions.

Closed or controlling questions correspond to the two lowest rungs on the ladder, the yes/no questions and the statements. They are seen as powerful: 'Power [...] is equated with control of the witness, and one kind of control is exerted through leading the witness to the desired answer' (Walker, 1987:77). The coercive questions are 'those in which the examiner imposes his own interpretation on the evidence' (Woodbury, 1982:8), and not surprisingly, they form the majority in cross-examinations: Danet and Bogoch found that 'a high 87% of all questions asked during cross were coercive, as opposed to 47% on direct' (op.cit.:48). The reason for this is of course the communicative process, which forces an attorney to phrase his alternative version of the story as a series of questions; he will ask not for information, but for confirmation of something he already knows, or believes.

This peculiarity is also behind the refusal of Adelswärd et al. (1987) to see the statement form as unambiguously coercive: they view it as either a request for minimal confirmation, or as an invitation to expand conversationally, which is reasonable enough according to the cooperative relevance principle: you do not tell people something you both know without one of these motives.

In practice, in the present material, conversational maxims of cooperation tend to favour the privileged questioner. The dividing line runs between X and XX, inasmuch as counsel's own witnesses sometimes hear an invitation to expand, and are rarely stopped, whereas hostile witnesses 'hear' an obviously unintended invitation to expand only when they reject a statement and attempt a reformulation.

Just as statements are not necessarily hostile, so with closed questions; Danet and Bogoch recognize the difference and suggest that 'while we might easily label them combative on cross, during direct they are combative only in the sense that they control the information revealed in the reply, and minimize any potential damage to be done during either direct or cross. In other words, they are a sort of preventive measure on direct' (op.cit.:43-44). I would like to suggest that 'prevention' is not all

there is to it. As with the open questions, this type can be put to work in more than one way.

There is no doubt that closed questions 'work' on cross, partly because they are put as either to confirm known facts or to draw a logical conclusion from such a series:

(4) XX: - And when he talked about his children I think you said that he chùckled.
W: - Yes he did.
S: - And he was concèrned about his family . and his wife.
W: - Yes he was.
XX: [spreading hands, nodding rhythmically] - And you LIKED him, didn't you.
W: - Yes sir, I thought he was a very nice person - always treated me nice.

The expectation of agreement is such that the onus is on the witness if he wants to disagree. This is the case for an expert witness who has vouched for the genuineness of a photograph which Spence suggests could be a fake, along with other pictures known to have been 'phoneyed up by the CIA or the KGB'. The witness will not concede that he does not know hov· sophisticated their methods are:

(5) XX: - You don't know, do you.
W: - Yes I dò, I dò know.
XX: - You make room for the possibility that the CIA or the KGB could fool you?
W: - No.
XX: - You don't think they could?
W: - No.
XX: ..- Thànk you!

Spence chooses a formulation so mild that it is very hard to refuse (*make room for the possibility*); but the witness cannot concede this point without opening up for doubts about the rest of his evidence, which gives Spence the opportunity to *reinstate* the question for the third time, which acts as an aggravation that signals disbelief. His final *Thank you* is pronounced facing the jury; it is slightly delayed and pronounced with 'flooding', as if he cannot withhold a snort of scornful laughter.

One important feature in this little sequence is the underlying breach of social expectations of tact. This rule, which is strictly speaking outside language, but which still dictates lexico-grammatical choices, can be defined after Leech (1983); he distinguishes several maxims of politeness, and this particular one is the *modesty maxim*: "Minimize praise of *self*" (op.cit.:132). The witness flatly refuses the suggestion made to him; in return, he is made to claim infallibility, which is socially sanctionable and gives Spence a right to discount the answer, or rather, to hold it up for ridicule. As the question concerns individual beliefs about a hypothetical matter, there is no tangible reason to doubt the witness; but the slight pause and the

intonational marker signal to the jury that what they are seeing is not firmness but pigheadedness.

Tact maxims are also directly involved in the pragmatically highly cooperative use that can be made of what ought to be coercive questions in examination-in-chief.

When a new witness is introduced there is always a small series of check-questions for the benefit of the hearers, to establish in what capacity this particular witness has been called - here Mr Bugliosi:

(6) X: - Directing your attention right back to October 1963, were you employed at the Texas School Book Depository, located at the corner of Elm and Huston Street?
W: - Yes sir.

It is slightly less innocent when the series is used to build up the witness's importance in the eyes of the jury:

(7) X: - Doctor Petty, were you one of nine forensic pathologists chosen from around the country by the House Select Committee on Assassinations in 1977 to serve on the autopsy panel reinvestigating the assassination of President Kennedy?
W: - I wás

Such is the effect of the modesty maxim that it would be positively damaging for the witness if he had himself chosen these words if asked what his role was. Far from merely 'preventive' control, the minimal-confirmation-question is a *licence* to feed the jury information that the witness could not, in all modesty, give himself.

And such is the effect of this ploy that if it is combined with irony in building up the witness's importance, the use is absolutely lethal. This is what happens to an eye-witness who is called because he was very close to the President's limousine when the shooting occurred, and who is confident he knows where the shots came from; Spence opens the cross:

(8) XX: - Mr Brehm, have you ever stated to folks that you feel that you are possibly, erh, .that you are an èxpert, an authórity, on possibly six or eight seconds in history, erh .that you are an absolute expert in that area?

When the witness has admitted this, in some embarrassment, Spence proceeds to demonstrate a small inaccuracy in his account, compared with the film that exists of the assassination.

Spence exploits the use/mention distinction when he dangles the word *expert* in front of the witness, evidently without accepting it for his own use, thereby creating an opposition between what is claimed (by the witness) and what is demonstrated (by

himself): the distinction that is known in literary studies as that between 'telling' and 'showing'. It is the conjunction of the inaccurate telling and the more precise showing that carries the meta-message to the jury, and it carries coercive force, as the witness cannot at that stage retrieve his credibility by pointing out how slight the inaccuracy really was.

4. Coercion in the speech act system

To account for the coercive force, and the amount of power and control involved in questioning, it seems that we shall have to reckon with several levels in the speech situation. If we cannot go on syntactic form alone, because the coerciveness of the whole speech act is involved, then the **illocutionary** force, the way an act is to *count*, is an obvious candidate; but the problem with illocutions is that they can be treated as negotiable. For example, there is a tendency for cross-examining counsel to treat answers that are presumably intended as factual information as *admissions*, as in the following example, where Spence is with the witness that heard the shells drop on the floor:

(9) XX: - You thought there was an armed man up there [...] All right. You didn't run and get the hell out of there?
W: - No sir.
XX: - You never did call down for the police?
W: - No sir.
XX: - You stayed there for 15 minutes just watching the crowds after that, isn't that true? [...]
W: - I stood there for a while.
XX: - Yeah. [...]. Thànks, [genial smile and nod], 'preciate it.

The uptake in the last line, both the *Yèah* and the *Thànks*, is a receipt issued for the confirmation; and although this is the end of the cross, where witnesses are routinely thanked, Spence's evident satisfaction gives rise to the inference that the witness has been helpful; the uptake thus retrospectively defines the answer as the admission Spence was looking for.

But the sequence also illustrates the way the build-up in itself shapes a speech act in context. By mentioning several things that the witness did not do, Spence fields a 'normal', commonsense view of actions compatible with being directly underneath an assassin at work; and by spacing them in separate questions he aggravates the perlocutionary effect of *challenge*.

In circumstances of normal conversation, the challenged partner would undoubtedly have rallied in order to scotch the implicature that goes with the implied admission (i.e. that if he chose to hang around apathetically, he cannot have been terribly

convinced about the presence of a gunman at the time); but in a system that discourages initiatives, counsel has a relatively free hand in setting up perlocutionary effects for the benefit of the 'real' hearers.

It follows from this division that we are dealing with coercive forces that apply at different levels in the speech act system, and that the pragmatic forces are at least as effective as their syntactically demonstrable counterparts.

The highly specialized communicative process that is described here can only be understood if we insist on separate layers or strands containing messages for the several addressees.

The official version is that evidence consists of facts, of statements such as what witnesses know and/or experienced at the time, so that a chain of events can be strung together; interpretation of the facts is reserved for the attorneys' opening and closing speeches. But in practice, the string of 'facts' are produced under syntactic and pragmatic coercion, because they are tailored to the needs of the real addressee, the judge and the jury.

In this way, the whole question of coercion ties in narrowly with the need for counsel to second-guess the inferencing processes going on in the minds of the judge and jury members: hence the need to interpret the carefully elicited bits of information ('So is it true to say...?'), to preempt objections ('Doctor, you have no doubt heard the claim that (x)...would that in fact be possible?') or to plant insinuations about the witness's credibility. In this way, coercion in the primary interaction is transformed into suggestion in the secondary message.

Jurors, when asked, tend to assume that they were persuaded only by fact, particularly as they tend to regard statements they disagree with as emotion. The enormously important field of forensic rhetoric has not been touched on here; but there is an obvious connection between between the choice and shape of argument and the coercive force that can be wielded in questions. The pervasive assumption that cases are decided only on the basis of fact makes it so much more important to trace the art and craft whereby evidence attains the status of fact, and a version of the story is canonized as The Truth.

References

Adelswärd, V., Aronsson, K., Jönsson, L. and Linell, P. (1987). The unequal distribution of interactional space: Dominance and control in courtroom interaction. *Text* 7 (4): 313-46.

Atkinson, J.M. and Drew, P. (1979). *Order in Court. The Organisation of Verbal Interaction in Judicial Settings.* London: Macmillan.

Bülow-Møller, A.M. (Forthcoming). Trial evidence: Overt and covert communication in court.

Danet, B. and Bogoch, B. (1980). Fixed fight or free-for- all? An empirical study of combativeness in the adversary system of justice. *British Journal of Law and Society* 7: 36-60.

Danet, B., Hoffman, K., Kermish, N., Rafn, J. and Stayman, D. (1976). An ethnography of questioning in the court room. In *Language Use and the Uses of Language*, R.Shuy and A. Shnukal (eds.) Washington, DC: Georgetown University Press.

Dunstan, R. (1980). Context for coercion: Analyzing properties of courtroom 'questions'. *British Journal of Law and Society* 7: 61-77.

Harris, S. (1984a). Form and function of threats in court. *Language and Communication* 4: 247-71.

Harris, S. (1984b). Questions as a mode of control in magistrates' courts. *International Journal of the Sociology of Language* 49: 5-27.

Leech, G.N. (1983). *Principles of Pragmatics*. London: Longman.

Muecke, D.C. (1978). Irony markers. *Poetics* 7: 363-75.

Sperber, D. (1984). Verbal irony: Pretense or echoic mention? *Journal of Experimental Psychology: General.* 113 (1): 130-36.

Sperber, D. and Wilson, D. (1981). Irony and the use-mention distinction. In *Radical Pragmatics*, P. Cole (ed.) New York: Academic Press.

Sperber, D. and Wilson, D. (1986). *Relevance. Communication and Cognition.* Oxford: Blackwell.

Walker, A.G. (1987). Linguistic manipulation, power, and the legal setting. In *Power Through Discourse*, L. Kedar (ed). Norwood, N.J.: Ablex

Walter, B. (1988). *The Jury Summation as a Speech Genre.* Pragmatics and Beyond Vol.1. Amsterdam: Benjamins.

Woodbury, H. (1984). The strategic use of questions in court. *Semiotica* 48: 197-228.

Anne Marie Bülow-Møller holds degrees in English and Danish Studies from the Universities of Odense and Copenhagen, respectively, and a Ph D in linguistic criticism from the University of East Anglia. She has published mainly on discourse analysis and text linguistic methodology, and is currently engaged on a study of the discourse of international negotiations. She has lectured in the English department of the Copenhagen Business School since 1981.